No. 98-83

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CHARLES WILSON, GERALDINE WILSON, and RACHEL SNOWDEN, next friend/mother of VALENCIA SNOWDEN, a minor,

Petitioners,

v.

HARRY LAYNE, JAMES A. OLIVO, JOSEPH L. PERKINS, MARK A. COLLINS, ERIC E. RUNION, and BRIAN E. ROYNESTAD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether law enforcement officers violated Fourth Amendment law which was clearly established in April of 1992, thus invalidating their defense of qualified immunity, when they followed the apparently valid terms of a Justice Department policy that allowed members of the news media to accompany them and report on their conduct in properly executing a valid warrant?

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RESPONDENTS' BRIEF IN OPPOSITION

The petition for a writ of *certiorari* in this case should be denied. The specific issue decided below was whether law enforcement officers violated Fourth Amendment law which was clearly established in April of 1992, thus invalidating their defense of qualified immunity, when they allowed members of the news media to accompany them and report on their conduct in properly executing a valid warrant. Unlike any of the other circuit cases cited by petitioners, the law enforcement officers

in this case were following the apparently valid terms of a Justice Department policy that discussed and endorsed their authority to allow members of the news media to accompany them and report on their actions. In this situation, there is no circuit split over whether these officers were acting in bad faith or disregarding clearly established law such that they should be subjected to personal liability in monetary damages for obeying and applying that policy. Respondents in this case were simply implementing the terms of a facially valid policy, issued upon the Justice Department's undisputed legal authority, which appeared at the time to be binding on officials at their level of authority. They are entitled to a defense of qualified immunity in these circumstances.

COUNTERSTATEMENT OF THE CASE

This case arose out of Operation Gunsmoke, a federal initiative approved by then-Attorney General William Barr, in which U.S. Marshals teamed with state and local officials to apprehend dangerous criminals, in particular, armed fugitives who had been charged with or convicted of crimes involving violence with weapons. The arrests of Dominic and Marc Wilson (petitioners' sons), which prompted this lawsuit, were made by a joint team of U.S. Marshals and local officers pursuant to their combined authority under this initiative. *See* J.A. 17-19.[1] Petitioners brought this action under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). Several other facts complete the factual background to this case.

Petitioners fail to mention that the law enforcement officers in this case were acting in accordance with the terms of a directive that had been issued and approved by the Justice Department. At the time of the actions at issue in this case -- April of 1992 -- the U.S. Marshals Service was operating under a formal written policy governing "media ride-alongs." *See* J.A. 61-65 (U.S. Department of Justice, U.S. Marshals Service Policy on "Media Ride-Alongs"). This policy discussed and

[1] As in the petition, citations to the record here are to the Joint Appendix ("J.A.") that was prepared and filed in the court below.

endorsed the authority of law enforcement officers to allow members of the news media to accompany them in order to observe and record what actually happens during the execution of an arrest warrant. It expressly referred to their authority to allow media personnel to accompany them inside a building or residence as they properly executed a valid warrant. *See id.* at 62 ("If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal."). It also noted that "[k]eeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that." *Id.* at 61; *see also id.* ("Media 'ride-alongs' are one effective method to promote an accurate picture of Deputy Marshals at work.").

The department policy on "media ride-alongs" was facially valid and had never been challenged or criticized by any court. Indeed, at the time, only three courts had specifically addressed the propriety of the actions addressed by the policy, and all three had rejected constitutional challenges to the lawfulness of the officers' conduct. *See, e.g., Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). After the policy had been in effect for some time, and after the events giving rise to this case had already transpired, a court ruled for the first time that such conduct violated the Fourth Amendment. *Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). Immediately thereafter, the Justice Department amended the policy to eliminate the "media ride-along" component. *See* J.A. 65-75 (Policy Notice Mar. 21, 1994).

Also, in other rulings not at issue here, the District Court upheld the validity and the reasonableness of the arrest warrant for Dominic Wilson and determined that the officers did not use excessive force in executing the warrant. J.A. 24-28. As for the reporters, they did nothing more in this case than accompany the law enforcement officers as they properly executed the valid arrest warrant for Dominic Wilson, in order

to observe and report on their actions. They were not involved in executing the warrant or assisting the officers in doing so. *See* Pet. App. 70a; *see also* J.A. 61 ("Ride-alongs, as the name implies, are simply opportunities for reporters and camera crews to go along with Deputies on operational missions so they can see, and record, what actually happens."). The reporters photographed only those scenes that were already in the officers' plain view, and none of those photographs has ever been published. *Id.* at 55a n.2.

REASONS FOR DENYING THE WRIT

The most important fact about this case, which wholly vindicates the ruling below on the qualified immunity issue, is that respondents were following the terms of a binding and apparently valid policy issued by the U.S. Justice Department, which had never been challenged or criticized by any court. The effect of that policy is to underscore the good-faith conduct of these officers and to confirm that they were not disregarding clearly established law to violate petitioners' rights. Any holding to the contrary would require law enforcement officers to act on their own initiative to disregard the chain of command and to exercise their own untutored legal judgment by making guesses about whether to follow certain policies and disobey others to shield themselves from personal liability.

Although petitioners are correct in noting that there is a conflict among the circuits on the general issue raised in this case, the existence at the time of a specific and controlling departmental policy renders this case distinguishable from the other cases cited by petitioners. This case thus offers a poor vehicle for cleanly resolving that extant circuit split. In addition, because at the time these officers acted, no controlling decision and indeed no decision by *any* court *anywhere* in the country had ruled that their actions were unlawful, the ruling below accords with the Court's precedents governing the defense of qualified immunity. The Court has consistently admonished that public officials must be judged by law that is clearly established at the time, and they simply "cannot be expected to predict the future course of constitutional law."

Procunier v. Navarette, 434 U.S. 555, 562 (1978). In the particular circumstances of this case, therefore, no purpose would be served by granting plenary review of the qualified immunity issue raised under the Fourth Amendment.

I. QUALIFIED IMMUNITY IS PROPER FOR THESE OFFICERS, WHO DID NOT DISOBEY THE TERMS OF A BINDING AND FACIALLY VALID POLICY ON "MEDIA RIDE-ALONGS."

At the time of the events at issue here (April of 1992), the United States Marshals Service in the Justice Department had issued a binding and apparently valid policy governing "media ride-alongs," which had never been challenged or criticized by any court. *See* J.A. 61-65. This policy is material to show that the officers were acting in good faith when they permitted the reporters to accompany them and report on their conduct in properly executing a valid arrest warrant. *See, e.g., V-1 Oil Co. v. Wyo. Dep't of Envtl. Quality*, 902 F.2d 1482, 1488-89 (10th Cir.) (any reasonable officer -- who conducts a search "on the same day he was advised by fully informed, high-ranking government attorneys that a particular statute, which had not yet been tested in any court, lawfully authorized that particular search -- should not be expected to have known that the search was unconstitutional"), *cert. denied*, 498 U.S. 920 (1990). To rule otherwise would force individual law enforcement officers to make their own decisions about whether and when to follow department policies that appear to be valid and binding upon them. In the field of law enforcement, in particular, the result would be chaos that would undermine the central mission of protecting the public safety.

The Court has decided that government officials performing discretionary functions are immune from suit unless their conduct violated "clearly established" constitutional rights about which a reasonable person would have known at the time of the events in question. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The officers involved in Operation Gunsmoke were acting in accordance with all of the Justice Department's policies, which had been reviewed and approved by superior

officers and, it is reasonable to assume, by their legal advisors. Among those directives was the policy on "media ride-alongs," which clearly authorized and approved of this practice and, indeed, provided lengthy practical pointers about how to conduct and manage these situations. *See* J.A. 61-65. No reasonable person at their position in the chain of command would have believed that these officers were obliged to disobey the terms of this department policy in order to refrain from violating petitioners' "clearly established" constitutional rights. *See, e.g., Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) (officers implementing long-established policy are entitled to qualified immunity when no then-existing case law demonstrated that the particular policy was unconstitutional and the only appellate case on point had upheld a similar policy), *cert. denied*, 115 S. Ct. 1097 (1995); *Sullivan v. Town of Salem*, 805 F.2d 81, 87 (2d Cir. 1986) ("if those officers . . . were simply implementing an established policy of the town, then they would have available to them a defense of qualified immunity from personal liability"); *Wallace v. King*, 626 F.2d 1157, 1161 (4th Cir. 1980) ("law enforcement officers should not be held personally liable for monetary damages because they have followed the policy or instructions of their superiors, where the controlling law had not been authoritatively decided"), *cert. denied*, 451 U.S. 969 (1981).

To defeat a defense of qualified immunity, the contours of the constitutional right alleged to be violated "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," which requires that "in the light of preexisting law, the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). An important feature of that "preexisting law" in April of 1992 was the department policy *itself*, which indicated that media ride-alongs were lawful, even if the officers and accompanying media personnel proceeded into a residence to execute a warrant. *See* J.A. 62 ("If the arrest is planned to take place inside a house or building, agree ahead of time on when the camera can enter and who will give the signal."). Supervisory personnel at the Justice Department had approved and issued

this policy in order to further the important aim of facilitating effective law enforcement by educating the public and providing an accurate account of what the Marshals Service does day in and day out. *See* J.A. 61 ("The U.S. Marshals Service, like all federal agencies, ultimately serves the needs and interests of the American public when it accomplishes its designated duties. Keeping the public adequately informed of what the Service does can be viewed as a duty in its own right, and we depend on the news media to accomplish that.").

As the Court has made plain in many cases, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In the circumstances at issue here, respondents do not fit either category. They merely applied the department policy in effect at the time, which was later revised to conform to the subsequent holding of the District Court in the *Ayeni* case, after it had disapproved of similar conduct by law enforcement officers. *See* J.A. 66-75. To deny them qualified immunity in these circumstances would be to subvert the close and careful discipline and adherence to authority that is essential to sound law enforcement.

II. THIS CASE IS DISTINGUISHABLE FROM THE CIRCUIT CASES CITED BY PETITIONERS AND ACCORDS WITH THE COURT'S PRECEDENTS.

Petitioners correctly note that the circuit courts of appeals appear to disagree about whether law enforcement officers violate clearly established law by allowing members of the news media to accompany them and to observe, record, and report on their conduct as they properly execute a valid warrant on private property. *See* Pet. 8-14 (discussing cases). This case, however, presents an inappropriate vehicle for exploring and resolving that circuit split. As noted, these officers were acting in accordance with the binding terms of an apparently valid Justice Department policy that had never been challenged in court. They simply were not at liberty to depart from that policy or to refuse to implement its terms. It would thus be beyond the pale to find that they were not acting in good faith

or that they were disregarding clearly established law. These circumstances are materially different from the other cases cited by petitioners, in which law enforcement officers made their own determinations about how to proceed in executing a warrant with media personnel in attendance.

In addition, the federal and state officers' actions here -- and the policy that they followed -- were in harmony with all extant court decisions on this subject in April of 1992. At that time, three courts had considered and rejected constitutional challenges to the conduct at issue in this case. *See Moncrief v. Hanton*, 10 Med. L. Rptr. 1620 (N.D. Ohio 1984); *Higbee v. Times-Advocate, Inc.*, 5 Med. L. Rptr. 2372 (S.D. Cal. 1980); *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980). The Court has repeatedly instructed that when government officers are sued for money damages in their individual capacities, they are protected by the doctrine of qualified immunity unless the unconstitutionality of their conduct would have been patently obvious to any reasonable person "in the light of pre-existing law." *Anderson*, 483 U.S. at 640; *Harlow*, 457 U.S. at 818.

The decision below is fully in accord with the Court's precedents on qualified immunity. In particular, in *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Court upheld a claim of qualified immunity for public officials who engaged in wiretapping because the law was not "clearly established" at the time that such conduct was illegal. The Court based this holding on two unpublished federal district court decisions which had previously concluded that such conduct was not improper. *Id.* at 533-34 (citing *United States v. Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972), and *United States v. O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 1, 1970), *app. dismissed*, 453 F.2d 344 (10th Cir. 1972). The Court pointedly noted that its conclusion on qualified immunity was not affected by its own subsequent holding that the same conduct had violated the Fourth Amendment. *See Mitchell*, 472 U.S. at 535.

Disregarding the consistent tenor of the Court's qualified immunity cases, petitioners have repeatedly tried to persuade

the courts to judge their position under the light cast by subsequent decisions, including *Ayeni* and other more recent rulings. "Such hindsight-based reasoning on immunity issues is precisely what *Harlow* rejected." *Mitchell*, 472 U.S. at 535. In *Ayeni*, in particular, a federal district court ruled for the first time that similar conduct violated the Fourth Amendment, but that ruling did not even come down until almost two years after the events occurred in this case. *See Ayeni v. CBS, Inc.*, 848 F. Supp. 362 (E.D.N.Y.), *aff'd sub nom. Ayeni v. Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, 514 U.S. 1062 (1995). The response to that decision was pertinent and virtually immediate: the Justice Department amended the policy to eliminate the "media ride-along" component. *See* J.A. 65-75. That global response -- rather than asking a court retrospectively to impose personal liability upon individual officers to pay money damages -- was the most appropriate reaction to such a ruling.

Petitioners further contend that the decision below violates the Court's settled precedents interpreting the Fourth Amendment. *See* Pet. 14-19. In fact, the Fourth Circuit did not directly resolve this issue, stressing that "we do not address whether the officers' conduct was constitutional or appropriate, only whether the legal landscape when these events occurred was sufficiently developed that it would have been obvious to reasonable officers that the actions at issue were violative of the Fourth Amendment." Pet. App. 17a. A few points about petitioners' discussion, moreover, reveals that it operates at an impermissible level of generality in addressing issues of qualified immunity, a level of generality that elides some of the more difficult questions which reveal that the law is not clearly established in this area. *See, e.g., Bills v. Aseltine*, 52 F.3d 596, 602 (6th Cir. 1995) (criticizing the Second Circuit's ruling in the *Ayeni* case for having failed "to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms").

Petitioners quote the Court's statement that the Fourth Amendment confines an executing officer strictly within the bounds set by the warrant. Pet. 14-15 (quoting *Bivens*, 403 U.S. at 394 n.7). Yet there is no dispute in this case, at least at this

juncture, that the officers executed the arrest warrant for Dominic Wilson properly and that the warrant was valid. The issue instead is whether the media's accompaniment, which led only to the reporters observing and recording information that was already in the plain view of the officers, constitutes an independent violation of the Fourth Amendment. On this point, it is pertinent to note that the "plain view" doctrine is itself a recognized exception to the warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

Moreover, when petitioners attempt to argue that the reporters "seized" such intangible items as "news, information, [or] photographic images," Pet. 15, their argument again rests on very uncertain ground, rather than on any clearly established law. In *Arizona v. Hicks*, 480 U.S. 321, 324 (1987), the Court held that law enforcement officers recording the serial numbers on equipment "did not meaningfully interfere with [the owner's] possessory interest in either the serial numbers or the equipment, and therefore did not amount to a seizure." For this reason, the Fourth Circuit panel had noted that "[a]lthough an application of this definition indicates that the photographic images captured by the reporters were not seized within the meaning of the Fourth Amendment, we need not decide this issue because, at a minimum, it was not clearly established that it was." Pet. App. 63a n.5. That conclusion is sufficient to uphold respondents' defense of qualified immunity.

Petitioners' discussion also leads into an unilluminating quarrel over whether "the media's presence contributed to accurate reporting of law enforcement activities which in turn helps deter crime and police misconduct." Pet. 17. Although reasonable people could certainly disagree on this point, the Fourth Circuit majority correctly noted that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride-alongs advanced that interest." Pet. App. 15a; *see* J.A. 61 (describing and endorsing this function of media ride-alongs). Respondents, who were subordinates in the chain of command, were acting in good faith and did not violate

clearly established law when they complied with the reasonable and apparently valid terms of this policy in April of 1992.

Finally, petitioners misstate the opinion below when they claim that it required too great a level of specificity to overcome the defense of qualified immunity. The Fourth Circuit did *not* say that though the Court's constitutional rule may have been clear as a general matter, it had not yet been elaborated with enough factual specificity. *See* Pet. 19-20 (quoting Pet. App. 10a). Instead, the Fourth Circuit said that even if it were to agree that the Court's constitutional rule were clear as a general matter (which it did not accept), it was not obvious that respondents' conduct actually fell within the ambit of that rule. In particular, the court held that it would have been reasonable for respondents to conclude that permitting media representatives to observe and record the execution of an arrest warrant does serve a legitimate law enforcement purpose, such as by "facilitating accurate reporting that improves public oversight of law-enforcement activities." Pet. App. 10a.

Indeed, as noted above, the court later emphasized that "the media ride-along policy pursuant to which the reporters accompanied the officers indicated that keeping the public informed of the activities of the Marshals Service was a duty of that agency and that media ride-alongs advanced that interest." Pet. App. 15a.[2] Here again, therefore, the circumstances of this case strongly support respondents' defense of qualified immunity under the Court's consistent precedents headed by *Harlow*, *Mitchell*, and *Anderson*. Only by faithful application of this settled doctrine can law enforcement officers "reasonably anticipate when their conduct may give rise to liability for damages." *Davis v. Scherer*, 468 U.S. 183, 195 (1984); *see also Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974) (public officials must be permitted to fulfill their

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[2] Petitioners note that the court's earlier statements on this point (Pet. App. 10a) were not joined by a majority of the judges on the *en banc* panel, *see* Pet. 6 n.3 (citing Pet. App. 17a (Widener, J., concurring)), but the court's later statements on this point (Pet. App. 15a) were joined by a majority of the judges on the panel.

responsibilities under controlling law with "the decisiveness and the judgment required by the public good").

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of *certiorari* be denied in this case.

Respectfully submitted,

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